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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. _____

ORIENT LEASING CO., LTD., as OWNER
of the M/V MONTMARTRE,
Petitioner

-versus-

CACTUS PIPE and SUPPLY CO., INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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68pp

QUESTION PRESENTED

Two complaints were filed to recover for damages to cargo carried aboard a vessel, each seeking recovery *in personam* and *in rem*. No arrest process was issued under Rule E(3) of the Supplemental Admiralty Rules, the vessel was never attached or came within the Court's jurisdiction, no security or stipulation for value to release the vessel was given or filed under Rule E(5), and no agreement in lieu of seizure was made. A claim of owner by attorney was filed in both cases, in one of which the Court's jurisdiction was not expressly denied.

Did the Court of Appeals correctly decide that the District Court acquired *in rem* jurisdiction in the case where the claim did not expressly deny the Court's jurisdiction, holding that filing of claim gave the Court jurisdiction *in rem* and waived seizure?

LIST OF PARTIES

Orient Leasing Company, Ltd.,
defendant, appellee, and petitioner

Cactus Pipe & Supply Co., Inc.,
plaintiff, appellant, and respondent

Corinth Pipeworks, S.A.,
defendant, appellee/cross-appellant

Empire-United Stevedoring Corporation,
third-party defendant-appellee

Canadian Forest Navigation Company, Ltd.,
third-party defendant-appellee

Seanav International Company,
third-party defendant-appellee

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OPINIONS

The initial opinion of the District Court was rendered July 6, 1983, printed here Appendix, p. 28a. It was amended by an opinion of August 11, 1983, printed here Appendix, p. 38a.

The opinion of the Court of Appeals reversing and remanding the case is reported at 756 F.2d 1103, printed here Appendix, p. 1a. Rehearing was denied April 30, 1985.

The District Court rendered its opinion on remand on April 17, 1986, printed here Appendix, p. 43a.

On the second appeal the Court of Appeals affirmed the decision below in its opinion of December 12, 1986, printed here Appendix, p. 51a. Rehearing was denied January 13, 1987, printed here Appendix, p. 53a.

JURISDICTION

The final judgment of the Court of Appeals was entered on December 12, 1986. The motion for rehearing was denied on January 13, 1987.

Jurisdiction of this Court is invoked under 28 U.S. Code Section 1254(1).

RULES OF CIVIL PROCEDURE INVOLVED

SUPPLEMENTAL ADMIRALTY RULES

Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

. . .

(2) Actions in rem;

. . .

Rule C. Actions In Rem: Special Provisions

(1) WHEN AVAILABLE. An action in rem may be brought:

(a) To enforce any maritime lien;

. . .

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable

. . .

(3) PROCESS. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service . . .

. . .

(6) CLAIM AND ANSWER; INTERROGATORIES. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim . . .

Rule E. Actions In Rem and Quasi In Rem: General Provisions

(1) APPLICABILITY. Except as otherwise provided, this rule applies to actions . . . in rem . . . supplementing Rules B, C, and D.

. . .

(3) PROCESS.

(a) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. Process in rem and of maritime attachment and garnishment shall be served only within the district.

. . .

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY.

(a) IN GENERAL. Upon issuance and delivery of the process . . . the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) TANGIBLE PROPERTY. If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody . . .

(5) RELEASE OF PROPERTY.

(a) SPECIAL BOND. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security . . .

(b) GENERAL BOND . . .

(c) RELEASE BY CONSENT OR STIPULATION: ORDER OF COURT OR CLERK; COSTS. Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon his acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules . . .

STATEMENT

A cargo of steel products was shipped aboard the M/V MONTMARTRE for delivery in Houston, Texas. On out-turn it was found some of the cargo had been damaged in handling, and part of that shipped was not delivered. Separate admiralty suits were filed, one on behalf of the cargo underwriters (No. 80-1721) and the other by the consignee to recover its deductible under the cargo insurance policy (No. 80-1769).

Both suits were brought *in personam* and *in rem*. However, no *in rem* process was issued, the vessel was not arrested, no stipulation for value of any kind was given, and there was no agreement of any kind made to respond to judgment in lieu of seizure of the vessel.

By its attorney the vessel owner Orient Leasing Co., Ltd. filed claims in each of the two actions pursuant to Rule C(6) of the Supplemental Admiralty Rules. The claim filed in No. 80-1769 expressly denied the Court's jurisdiction. In the other claim no such denial was made, ownership simply being claimed with prayer to defend. (Within a short time the suits were consolidated and a few days later Orient Leasing moved for dismissal and summary judgment.)

The District Court held it had no *in rem* jurisdiction and dismissed the *in rem* claims against the vessel in both suits. The Court of Appeals reversed this decision in the suit where the owner made claim without denial of the Court's jurisdiction, holding that filing the claim of owner without denial of the Court's jurisdiction waived any objection to the Court's *in rem* jurisdiction, remanding and directing judgment in that suit accordingly.

EXISTENCE OF JURISDICTION BELOW

The provisions of 28 U.S. Code, Section 1333(1), conferred jurisdiction on the District Court, and those of 28 U.S. Code, Section 1291, conferred appellate jurisdiction on the Court of Appeals.

REASONS FOR GRANTING THE WRIT

With respect, the Court of Appeals has not followed the Supplemental Admiralty Rules as they govern *in rem* proceedings and has not followed the decisions of this Court, which require that a decree *in rem* can only be lawfully entered when a *res* is within the control of the Court. *In rem* jurisdiction is *subject-matter* jurisdiction, and there can lawfully be no waiver of subject-matter jurisdiction, waiver being lawful only with respect to jurisdiction over the person:

The Supplemental Admiralty Rules can only reasonably be read to require that in *in rem* proceedings the *res* be brought into Court. Rule E(4)(b) expressly provides that if property is to be arrested or attached, the marshal shall take it into his possession. Rule E(5) provides that whenever process of attachment is issued the execution of process shall be stayed on giving of security to be approved by the Court or Clerk or by a stipulation of the parties, which is of course to be filed with the Clerk since the Rule provides for the terms of the stipulation and its handling and the handling of a general bond. And that the *res,* either the physical object such as the vessel or the security given in lieu of the object, is to be at all times within the Court's control or possession is made clear by Rule E(5)(c), which provides that no property shall be released without the giving of security.

As the Supplemental Rules show, admiralty jurisdiction is of two kinds, *in personam* and *in rem*. The latter is founded upon custody of the *res*. In *The Resolute*, 168 U.S. 437, 439, 18 S. Ct. 112 (1897), the basic principle is clearly stated:

> "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit *in rem* . . . it presupposes . . . second, that the property proceeded against is within the lawful custody of the Court. . . ."

To like effect is the decision in *In The Matter of The Indiana Transportation Company*, 244 U.S. 456; 37 S. Ct. 717 (1917), where it is held, "The foundation of jurisdiction is physical power. If a defendant's body were held in custody by arrest, or *a vessel* were *held by proceedings in rem*. . . ." (Emphasis added.)

The principle is plainly stated particularly in the (dissenting) opinion in *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 36, 80 S. Ct. 1470, 1479 (1960):

> ". . . this Court has consistently held that an admiralty proceeding *in rem* is one essentially against the vessel itself as the debtor or offending thing; and, in such an action, the vessel itself is impleaded as the defendant, seized, judged and sentenced. . . ."

And the (dissenting) opinion proceeds to point out that the stipulation on bond (there a "letter of undertaking") is substituted for and stands as the vessel in the custody of the Court.

Unless a Court has jurisdiction it cannot lawfully enter a decree with respect to the subject-matter where its

jurisdiction is *subject-matter* jurisdiction, *in rem* jurisdiction. *New Orleans & Bayou Mail Company v. Fernandez,* 12 Wall. (U.S.) 130, 20 L.Ed. 249 (1870); *United States v. Huckabee,* 16 Wall. (U.S.) 414, 21 L.Ed. 457 (1873); *In re Bonner,* 151 U.S. 242, 14 S. Ct. 323 (1894).

Equally well-settled (and directly in point here with respect to the Court of Appeals finding of waiver) is the principle that *lack of subject matter jurisdiction cannot be waived;* only jurisdiction over the person is subject to waiver. Such is well-put in *City of Gainesville v. Brown-Crummer Inv. Co.,* 277 U.S. 54, 59, 48 S. Ct. 454, 456 (1928):

> "Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. *Grace v. American Central Ins. Co.,* 109 U.S. 278, 283, 3 S. Ct. 207, 27 L.Ed. 932; *Mansfield C. & L. M. Railway Co. v. Swan,* 111 U.S. 379, 382, 4 S. Ct. 510, 28 L.Ed. 462; *Mattingly v. Northwestern Virginia Railroad Co.,* 158 U.S. 53, 56, 57, 15 S. Ct. 725, 39 L.Ed. 894 . . ."

To summarize, the ~~District~~ Court correctly held that since there was no *res* within its control it had no jurisdiction upon which it could enter an *in rem* decree against the vessel, and the Court of Appeals erred in holding that *in rem* jurisdiction could be and was waived by simply filing a claim to a vessel over which the Court had no manner of custody.

CONCLUSION

In holding that by filing a claim in an *in rem* proceedceeding where there was no *res* within the custody or control of the Court such filing constituted waiver of arrest and gave the District Court jurisdiction over a vessel of which it had no custody the Court of Appeals misconstrued the Supplemental Rules in Admiralty and decided a federal question in conflict with applicable decisions of this Court, and petitioner respectfully prays that certiorari be granted and thereafter the decisions below be reversed.

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APPENDIX A

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff-Appellant, Cross-Appellee,

v.

M/V MONTMARTRE, her engines, tackle, etc., et al., Defendants-Appellees,

ORIENT LEASING CO., LTD.,
Cross Plaintiff-Appellee,

v.

CORINTH PIPEWORKS, S.A., Cross Defendant-Appellee, Cross-Appellant.

NO. 83-2478.

United States Court of Appeals,
Fifth Circuit.

April 5, 1985.

Consignee brought action against vessel owner for damage to cargo of steel tubing shipped aboard vessel. The United States District Court for the Southern District of Texas, James DeAnda, J., entered judgment for vessel owner, and appeal was taken. The Court of Appeals, Brown, Circuit Judge, held that: (1) claims of owner filed by vessel owner established in rem jurisdiction over vessel; (2) vessel owner was not liable as carrier of cargo; and (3) sailing of vessel with cargo of steel pipes aboard constituted ratification of bills of lading.

Affirmed in part, reversed in part and remanded.

Patrick E. Higginbotham, Circuit Judge, filed dissenting opinion.

Appeals from the United States District Court for the Southern District of Texas.

Before BROWN, TATE, and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This appeal arises from claims for damage to a cargo of steel tubing shipped aboard the M/V MONTMARTRE in July, 1979. Because we find that *in rem* jurisdiction was established in one case of this consolidated action, we reverse. We also reverse and remand for a determination of whether the vessel was liable *in rem*. We affirm the tral court's finding that appellee, vessel owner, was not liable as the carrier of cargo because there was no evidence that the vessel owner authorized issuance of the bills of lading either by actual or apparent authority.

How It All Began

Appellant, Cactus Pipe & Supply Co., Inc. (Cactus), contracted with Corinth Pipeworks, S.A., (Corinth) to purchase steel tubing. Under this agreement, the trial court found that Corinth was to arrange for shipment from Corinth, Greece to Houston, Texas. The cargo was shipped aboard the M/V MONTMARTRE owned by appellee Orient Leasing Co., Ltd. (Orient).

Before the carriage of cargo in issue, Orient bareboat chartered the MONTMARTRE to Eternity Navigation Co., S.A. (Eternity), in September, 1976. Eternity, as

bareboat charter owner, time chartered the vessel to Iino Kaiun Kaisha, Ltd. (Iino). Iino in turn time chartered the MONTMARTRE to Canadian Forest Navigation Co., Ltd. (Canadian) in June, 1979. In July, 1979, Canadian voyage chartered the MONTMARTRE to Seanav International Co. (Seanav). Seanav in turn voyage chartered the vessel to Corinth.

Nine bills of lading covering the cargo were issued on July 14, 1979, signed by Delpa Shipping and Transportation Co., Ltd. (Delpa) "For The Master."[1] The vessel arrived in Houston in August, 1979, and surveyors observed damage in the hold before unloading. In addition to damage, appellant Cactus contends that portions of the cargo were never delivered.

Cactus, consignee of the cargo of steel tubing, instituted two causes of action seeking recovery of its damages. The First action (District Court No. H-80-1721) was brought in Cactus' name by its subrogated underwriter against the MONTMARTRE, Orient and Corinth. The Second action (District Court No. H-80-1769) was instituted by Cactus seeking recovery of the uninsured portion of its loss (approximately $10,000) against the vessel and against Orient, the vessel owner. The MONTMARTRE was never arrested. However, a claim of

---

1. Delpa was an agent for Corinth at the loading Port of Corinth, Greece under Corinth's charter party with Seanav. The Master of the MONTMARTE sent Delpa the following letter on July 13, 1979:

> I hereby authorize you to sign, on my behalf, bills of lading as per the Mate's Receipts without any remarks, as per relative C/P.

The trial court determined that technically, the bills of lading were not issued by Orient, Corinth, or their agents, but rather by the agent of the time charterer, Iino. Iino was not made a party to this suit. However, for reasons stated, we do not need to determine the charterer on whose behalf the bills of lading were issued.

owner[2] was filed by Orient in both actions. Subsequently the two cases were consolidated pending trial.

On July 6, 1983, the district court, after a bench trial, entered its opinion finding that the cargo was damaged and short upon delivery in Houston, Texas. It also found that Corinth, the voyage charterer and shipper, was liable as a carrier of the cargo and that Orient, the vessel owner, was not liable because it was not the COGSA[3] carrier. The trial court found that the MONTMARTRE, although the carrying vessel, was not liable to Cactus because it was not liable for the acts or omissions of the charterer/shipper, Corinth. The district court entered judgment in

---

2. (i) Filed in the First suit (District Court No. H-80-1721) on September 16, 1981:

> CLAIM OF OWNER TO THE M/V MONTMARTRE
>
> NOW APPEARS Orient Leasing Co., Ltd., for the interest of itself as owner of the M/V MONTMARTRE, her engines, etc., before this Honorable Court, and makes claim to the said vessel as the same is proceeded against at the instance of Cactus Pipe & Supply Co., Inc., and the said claimant avers that it was at the time of the filing of the complaint here, and still is, the true and bona fide owner of the M/V MONTMARTRE, her engines, etc.; wherefore, it prays to defend accordingly.

(ii) Filed in the Second suit (District Court No. H-80-1769) on September 16, 1981:

> ORIENT LEASING CO., LTD., CLAIM OF OWNER TO THE M/V MONTMARTRE
>
> NOW APPEARS Orient Leasing Co., Ltd., for the interest of itself as owner of the M/V MONTMARTRE, her engines, etc., before this Honorable Court, and, *without waiving its defense that it is not subject to the jurisdiction* of this Honorable Court, makes claim to the said vessel as the same is proceeded against at the instance of Cactus Pipe & Supply Co., Inc., and the said claimant avers that it was at the time of the filing of the complaint here, and still is, the true and bona fide owner of the M/V MONTMARTRE, her engines, etc.; wherefore, it prays to defend accordingly.

(emphasis supplied)

3. Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15.

favor of Cactus and against Corinth for $28,673.51 plus interest. On August 11, 1983, the trial court issued amended conclusions of law determining that *in rem* jurisdiction over the vessel did not exist because the vessel was never arrested nor had any bond or letter of undertaking been filed in the court by the owner of the vessel. The court held that the claims of owner filed by the vessel owner, Orient, manifested only the vessel owner's interest in the vessel and did not establish *in rem* jurisdiction. The district court also determined that, although a voyage charterer such as Corinth may be liable as a carrier, the evidence was insufficient to hold Corinth liable as a carrier under the facts of this case.[4] Accordingly, Cactus was awarded nothing.

The MONTMARTRE—In Rem Jurisdiction

[1] Cactus disputes the district court's conclusion that there was no *in rem* jurisdiction established over the MONTMARTRE. Specifically, Cactus urges that the claims of owner[5] filed by Orient constituted an appearance on the part of the vessel thereby establishing *in rem* jurisdiction.

[2] Generally, the power of the court to exercise jurisdiction over a vessel depends upon the arrest of the vessel within the court's territorial jurisdiction. *Reed v. The YAKA*, 307 F.2d 203, 204, 1962 A.M.C. 1226, 1228 (3d Cir. 1962), *rev'd on other grounds*, 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448, 1963 A.M.C. 1373

4. Cactus did not raise any issues of liability against the shipper/charterer Corinth on appeal.

5. A claim of owner is a verified document filed by the claimant stating its possessory interest in the vessel, demanding restitution and the right to defend the vessel. *See supra* note 2.

(1963); *see also* Rule C, Supplemental Rules for Admiralty and Maritime Claims. A claimant, however, can waive the necessity of *in rem* seizure and consent to jurisdiction so far as its interest in the vessel is concerned. *The YAKA*, 307 F.2d at 204, 1962 A.M.C. at 1228. Thus in *Continental Grain Co. v. Federal Barge Lines, Inc.*, 268 F.2d 240, 1959 A.M.C. 2158 (5th Cir. 1959), *aff'd sub nom. Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 80 S. Ct. 1470, 4 L.Ed.2d 1540, 1961 A.M.C. 1 (1960), we dealt with the issue of whether an *in rem* proceeding upon application of a willing claimant could be transferred under 28 U.S.C. 1404(a) to a district in which the *res* was not located. However, we initially determined that the issuance of a letter of undertaking on behalf of the vessel and a Non-Waiver of Rights Clause in the letter perfected the *in rem* jurisdiction of the court. On the filing of the action *in rem* and *in personam* for damage to a cargo of soybeans, the barge FBL-585 was not seized. We pointed out that in accordance with the practice in major seaports, a letter of undertaking was given by the vessel owner providing that in consideration of the barge not being seized and released on bond, the vessel owner would "file claim to Barge FBL-585, . . . and that, vessel lost or not lost would pay any final decree which may be rendered against said vessel in said proceedings." 268 F.2d at 243, 1959 A.M.C. at 2160. We determined that the letter of undertaking, and particularly the Non-Waiver of Rights Clause,[6] required

6. In *Continental Grain* the undertaking expressly stated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshall under said *in rem* process, and released by the filing of claim and release bond." 268 F.2d at 243 n. 3, 1959 A.M.C. at 2161.

that "we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree with sureties executed and filed by Claimant, and the vessel formally released." *Id.* Essentially, the underlying rationale for all of this was the necessity of avoiding "needless costs, time, and inconvenience to litigants, counsel, ships, Clerks, Marshals, Keepers and court personnel. . . ." *Id.*[7] In *Associated Metals & Minerals Corp. v. S.S. PORTORIA,* 484 F.2d 460, 1973 A.M.C. 2095 (5th Cir. 1973), no *in rem* process was issued, the vessel was not arrested, and the owner did not waive attachment of the vessel. We thus determined on those grounds that the district court erred in entering judgment against the vessel *in rem.*

[3] In other contexts, a party can waive an objection to *in personam* jurisdiction. See F. R. Civ. P. 12. Rule 12(h)(1) provides that the defense of lack of jurisdiction over the person is waived (i) if omitted from a motion under 12(g), or (ii) if it is neither made by motion under Rule 12 nor included in a responsive pleading or an amendment. *See Golden v. Cox Furniture Mfg. Co.,* 683 F.2d 115 (5th Cir. 1982) (objection to personal jurisdiction waived when answer and amended answer filed without raising *in personam* jurisdiction objection); *Jackson v. Hayakawa,* 682 F.2d 1344, 1347 (9th Cir. 1982) (jurisdiction attaches if a defendant makes a voluntary general appearance, as by filing an answer through an attorney); *Familia De Boom v. Arosa Mercantil, S.A.,* 629 F.2d 1134, 1140, 1981 A.M.C. 2937, 2944 (5th

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7. The Supreme Court affirmed our disposition of the case, holding that it was proper for the district court in which the cargo owner's *in personam* and *in rem* actions were brought to transfer it pursuant to 28 U.S.C. § 1404(a) to the district court in which the vessel owner brought an action against cargo for negligence.

Cir. 1980), *cert. denied,* 451 U.S. 1008, 101 S. Ct. 2345, 68 L.Ed.2d 861, 1981 A.M.C. 2100 (1981) (service of process and personal jurisdiction may be waived by a party); *United States v. Fishing Vessel MARY ANN,* 466 F.2d 63, 1972 A.M.C. 2652 (5th Cir. 1972), *cert. denied sub nom. Walter v. United States,* 410 U.S. 929, 93 S. Ct. 1365, 35 L.Ed.2d 590 (1973) (action to foreclose preferred ship mortgage—two defendants not served with process but answered asserting defenses on the merits).

Generally, an appearance in an action involves some presentation or submission to the court. *Port-Wide Container Co. v. Interstate Maintenance Corp.,* 440 F.2d 1195, 1196 (3d Cir. 1971) (no appearance found). An appearance may result from the filing of an answer without raising jurisdictional defects. An appearance may also arise by implication "from a defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting only the jurisdiction or by reason of some act or proceedings recognizing the case as in court." 6 C.J.S. *Appearances* § 18 at 22 (1975); *see also Grammenos v. Lemos,* 457 F.2d 1067, 1070 (2d Cir. 1972) (if a party enters a case and fails to object to jurisdiction, and requests the court to do some affirmative act on its behalf in some substantive way, the party will be held to have waived further objection).

[4] In this case we must decide whether the filing of a claim of owner in a proceeding characterized expressly in the complaint as both *in rem* and *in personam* with the traditional prayer for issuance of process *in rem* against the vessel is sufficient to obtain *in rem* jurisdiction over the vessel. We hold that it does.

Some procedural background in this case is necessary to our analysis of *in rem* jurisdiction. In the First suit (District Court No. H-80-1721), the subrogated underwriter brought suit in the name of its assured, Cactus, against the vessel owner, vessel and charterer, Corinth. Cactus' prayer requested:

> that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the M/V MONTMARTRE, citing all persons having any interest in said vessel to appear and answer on oath all and singular the matters aforesaid. . . . That the said M/V MONTMARTRE may be condemned and sold to pay the damages, with interest, costs and disbursements.

There was also a prayer for process against Orient and Corinth, and in fact, process was issued only as to Orient and Corinth. Orient answered for itself[8] and there was no mention of an *in rem* jurisdiction challenge. Orient also filed several third party complaints and pursued discovery against all parties. On September 16, 1981, Orient filed its Claim of Owner to the MONTMARTRE[9] and a motion for consolidation of the two pending cases.

In Second suit (District Court No. H-80-1769) the complaint was filed by Cactus against the MONTMARTRE and Orient for $10,000 on August 6, 1980 (recovery of the uninsured portion of its loss). Cactus' complaint prayed:

---

8. Orient's answer began: "Now comes Orient Leasing Co., one of the defendants herein. . . ."

9. *See supra note* 2, part (i).

> that process in due form of law according to the practices of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against M/V MONTMARTRE, her engines, boilers, tackle, etc., and that all persons having any right, title and interest therein be cited to appear and answer on oath all and singular the matters aforesaid, and that the said M/V MONTMARTRE may be condemned and sold to pay the damages of the aforesaid, with interest and cost.

No *in rem* process was issued by the Clerk. The only process issued was against Orient.

The Second case proceeded as a separate suit in a different district court. In November, 1980, an order of dismissal was entered by the trial judge for failure to prosecute. The judge later granted reinstatement of the case. Cactus moved for entry of a default judgment which the trial court later granted. The default judgment recites that both the vessel and vessel owner were defendants, were properly served, and they failed to appear and answer. Two months later on August 12, 1981, Orient and the MONTMARTRE filed in the Second suit a motion to vacate and set aside the default judgment. Apparently the complaint was sent to Orient in Japan and there was some confusion with the First suit already on file. It is important to point out that in this motion, an objection to *in rem* jurisdiction was raised on the ground that the vessel was not arrested. The trial judge set aside the default judgment on September 8, 1981. On September 16, 1981, Orient filed its answer—only as to itself—and expressly asserted an objection to *in rem* jurisdiction. Orient also filed interrogatories and a third party complaint each raising the

jurisdiction objection. On the same day, Orient filed its claim of owner[10] specially preserving its objection to the jurisdiction of the court.

On September 22, 1981, both trial judges in the two pending suits entered an order consolidating the cases "for all purposes." After the consolidation, on October 6, 1981, Orient as defendant and claimant and the MONTMARTRE as defendant[11] moved for summary judgment on the merits and on the ground that there was no *in rem* jurisdiction. Thereafter, the trial judge entered his memorandum and order denying the motion for summary judgment. The trial court did state, however, that there was a colorable challenge to the *in rem* jurisdiction of the court. Since neither party had adequately briefed this issue, the defendant was permitted to resubmit a motion to dismiss for lack of *in rem* jurisdiction.[12] The consolidated cases were tried before the judge, and he entered his findings in July, 1983, and amended conclusions of law in August, 1983. Initially the trial court determined that Corinth, the voyage charterer, was liable as the carrier but Orient and the MONTMARTRE were exonerated. The trial court issued amended conclusions of law holding that there was no *in rem* jurisdiction over the vessel and the evidence was insufficient to hold Corinth responsible for the damage to the cargo.

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10. *See supra* note 2, part (ii).

11. The motion for summary judgment began: "the M/V MONTMARTRE and Orient Leasing Co., Ltd., two of the defendants in the above-entitled and numbered causes. . . ."

12. The record contains no memoranda or motion responding to this request.

Rule C(6),[13] Supplemental Rules for Admiralty and Maritime Claims clearly defines the purpose of filing a claim of owner. The claimant must state his interest in the vessel by *virtue* of which the claimant demands *restitution* of the vessel and *the right to defend* it. The vessel owner's right to file an answer is predicated upon the filing of the claim of owner pursuant to Supplemental Rule C(6). "The right of answering in denial or avoidance of the libel, and all of it, in a suit *in rem* in the admiralty, depends upon the right to claim. . . . [T]he claimant in admiralty may defend *in rem,* because he demands the redelivery to him of the arrested vessel." *The CARTONA,* 297 Fed. 827, 828, 1924 A.M.C. 771, 772 (2d Cir. 1924). We thus agree with the trial court that the claim of owner manifests the owner's interest in the vessel. We must disagree with the trial court's determination that an unconditional claim does not give rise to *in rem* jurisdiction. When the vessel owner lays claim to the vessel he has appeared on its behalf.

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13. Rule C, Supplemental Rules for Admiralty and Maritime Claims, provides in part:

> (6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

In *The ROSALIE M*, 12 F.2d 970, 1927 A.M.C. 999 (5th Cir. 1926) a warrant of seizure was issued in a forfeiture proceeding and the vessel was seized. Appellant filed an answer and *claimed* the vessel as agent for the owner. On appeal, the appellant contended that (i) the seizure of the vessel was unlawful because it was made beyond the territorial jurisdiction of the United States since the Volstead Act (a cargo of liquor was seized) had no effect beyond three miles from the shore and (ii) the Coast Guard had no authority outside the twelve mile limit under the Tariff Act of 1922.

We determined that, conceding that the Volstead Act was not in operation at the point where the vessel was initially seized, the vessel was nevertheless subject to seizure because she was engaged in an unlawful enterprise. We further conceded, without deciding, that the Coast Guard cutter was not authorized to operate outside the twelve mile limit. We reasoned that it did not necessarily follow that the judgment was illegal and that the objection to the authority of the Coast Guard to make the seizure was purely technical and without merit. We stated that "after a ship is brought into the custody of the marshal through proper admiralty process any irregularity in the initial seizure is immaterial, and is *waived* by filing *a claim* or answer." 12 F.2d at 971, 1927 A.M.C. at 1002 (emphasis supplied). The Supreme Court similarly ruled in *The MERINO*, 22 U.S. (9 Wheat.) 391, 400, 6 L.Ed. 118, 120 (1824), in which the vessel owner questioned irregularities in the *in rem* process. The Court reasoned that all objections to the irregularities were waived by the appearance of the parties interested in the property seized and filing their claims to the *res*. *Id*.

[5] In this case there were two claims of owner filed. In the First suit (District Court No. H-80-1721 suit brought by subrogated underwriter) the claim of owner stated: "Now appears Orient . . . and makes claim to the [MONTMARTRE] . . . and said claimant avers that it was . . . owner . . . wherefore it prays to defend accordingly." In the Second suit (District Court No. H-80-1769) the claim of owner was the same as that filed in the other case except it stated ". . . without waiving its defense that it is not subject to the jurisdiction of this Honorable Court." (See note 2, parts (i) and (ii)).

We are persuaded that the claim of owner filed in the First suit (District Court No. H-80-1721) perfected the *in rem* jurisdiction of the district court. By the filing of this claim without any jurisdictional objection—and without any prior objection in the pleadings—the MONTMARTRE has appeared. The Claim of Owner does more than state the vessel owner's interest. The Claim specifically demands the return of the vessel—a substantive request that is detrimental to the plaintiff. The filing of the claim of owner also bears many of the earmarks of the filing of a claim of owner with a letter of undertaking in *Continental Grain,* 268 F.2d at 243, 1959 A.M.C. at 2160, and was effective under the circumstances of this case.

In the Second suit (District Court No. H-80-1769), however, the vessel owner adequately preserved its *in rem* jurisdiction. From Orient's and the MONTMARTRE's initial motion to vacate the default judgment through the consolidation of the cases, the objection to *in rem* jurisdiction was adequately raised and preserved. *See Aetna Business Credit, Inc. v. Universal Decor & Interior*

Design, Inc., 635 F.2d 434 (5th Cir. 1981) (objections to adequacy of service of process preserved).

We hold therefore that the trial court incorrectly determined that there was no *in rem* jurisdiction over the vessel in the consolidated action insofar as that action relates to the allegations in the First suit (District Court No. H-80-1721). However, the action asserted by Cactus against the vessel and vessel owner in the Second suit (District Court No. H-80-1769) was correctly dismissed for lack of *in rem* jurisdiction.

Orient—Vessel Owner

Cactus asserts that the trial court erroneously refused to find *in personam* liability against Orient, the vessel owner. It does so on the basis that the bills of lading were issued with the apparent authority of the vessel owner and that Cactus relied on such apparent authority. The bills of lading were signed by Delpa "For The Master" —who technically was not the employee of Orient, the vessel owner. The trial court found that none of the parties to this case issued the bills of lading.[14]

Cactus asserts that the apparent authority claim is based largely on the failure of the bills of lading to identify the carrier or the party who employed the Master or on whose behalf the agent was acting when the bills of lading were signed. In support of this claim it also argues that the bills of lading were on anonymous standard forms, and that the printed text of the bills of lading refer to "owner" and "shipowner." Cactus further argues that it and the holders of the bills of lading could reasonably believe that they were issued with the authority of

14. *See supra* note 1.

the vessel owner. We conclude that this evidence alone did not justify Cactus in believing that the bills of lading were issued by an agent authorized to do so on behalf of Orient, the vessel owner.

[6-8] Maritime law embraces the principles of agency. *West India Industries, Inc. v. Vance & Sons AMC-Jeep,* 671 F.2d 1384 (5th Cir. 1982). We initially point out that Cactus introduced no evidence of any actual authority of an agent to issue the bills of lading on behalf of the vessel owner. *See Associated Metals & Minerals Corp. v. SS PORTORIA,* 484 F.2d 460, 462, 1973 A.M.C. 2095, 2096-97 (5th Cir. 1973). Nor was apparent authority established. Apparent authority is created as to a third person by conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to the act done on his behalf by the person purporting to act for him. Restatement of Agency Second § 27. Apparent authority is distinguished from actual authority because it is the manifestation of the principal to the third person rather than to the agent that is controlling.

[9-11] In this case there are no facts which could reasonably lead Cactus or the holder of the bills of lading to believe that they were issued on the vessel owner's behalf. Our analysis is based upon the premise that for apparent authority to exist there must be some manifestation (whether an act or an omission) of the principal that causes the third person to believe that the agent is authorized to act for him or the principal should realize that his conduct is likely to create such a belief. *See* Restatement (Second) Of Agency § 27 comment a. Cactus has not pointed to any facts sufficiently supporting some manifestation by the vessel owner to Cactus

justifying reliance. Here, the bills of lading were issued by Delpa, the agent of Corinth or Iino (*see supra* note 1). Furthermore, there was no evidence that the vessel owner authorized Delpa to issue bills of lading or that the vessel owner approved the form or contents. An agent cannot confer authority upon himself. *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 10, 1978 A.M.C. 2634, 2647 (2d Cir. 1978). The court in *Karavos* quoted Judge Levet in *Dr. Beck & Co., GmbH. v. General Electric Co.*, 210 F.Supp. 86, 90 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 538 (2d Cir. 1963) by an analysis which applies with equal force in this case:

> While agents are often successful in creating an appearance of authority by their own acts and statements, such an appearance does not create apparent authority (*quoting* Mechem, Agency 61 (4th ed. 1952)), 588 F.2d at 10, 1978 A.M.C. at 2647.

We thus can find no sufficient basis to conclude that Cactus or the holder of the bills of lading reasonably relied on some manifestation by Orient, the vessel owner, to justify a belief that the bills of lading were issued on Orient's behalf.

[12] There was no basis, therefore for holding Orient liable *in personam*.

The MONTMARTRE

[13] Cactus nevertheless contends that the MONTMARTRE is itself liable *in rem* for damage to the cargo of steel tubing involved in the First suit (District Court No. 80-1721). A proceeding *in rem* in the admiralty is

one against the vessel as the offending thing.[15] The vessel may be held liable even in the absence of the liability, *in personam,* of the vessel owner. *Canadian Aviator, Ltd. v. United States,* 324 U.S. 215, 224, 65 S. Ct. 639, 644, 89 L.Ed. 901, 908, 1945 A.M.C. 265, 272 (1945);[16] *Grigsby v. Coastal Marine Service,* 412 F.2d 1011, 1030-31, 1969 A.M.C. 1513, 1539 (5th Cir. 1969), *cert. dismissed,* 396 U.S. 1033, 90 S. Ct. 612, 613, 24 L.Ed. 2d 531 (1970).[17]

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15. *But cf. Baker v. Raymond International, Inc.,* 656 F.2d 173, 184, 1982 A.M.C. 2752, 2767 (5th Cir. 1981), *cert. denied,* 456 U.S. 983, 102 S. Ct. 2256, 72 L.Ed.2d 861, 1982 A.M.C. 2107 (1982). In *Baker,* Judge Rubin discussed the fiction of the vessel's personality. " '[T]he fiction of ship's personality,' according to Professors Gilmore and Black, 'has never been much more than a literary theme,' now fallen into disrepute." *Id.* Fiction or not, the notion still has vitality in those situations in which settled principles of maritime law recognizes the difference—indeed sometimes the absence—of *in personam* liability. *See e.g. Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique,* 182 U.S. 406, 21 S. Ct. 831, 45 L.Ed. 1155 (1901); *Associated Metals & Minerals Corp. v. S.S. PORTORIA,* 484 F.2d 460, 1973 A.M.C. 2095 (5th Cir. 1973).

16. In *Canadian Aviator,* the Supreme Court determined:

> The use of the phrase 'caused by a public vessel' constitutes an adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship. Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court. (citations omitted)

Canadian Aviator, 324 U.S. at 224, 65 S. Ct. at 644, 89 L.Ed. at 908, 1945 A.M.C. at 272.

17. In *Grigsby,* this court reasoned:

> Obviously of course, the absence of possession and control may well insulate the shipowner from a liability in personam in the absence of conduct which somehow implicates the remote owner in the deficiency. But on principles of *in rem* liability, or concepts akin to it, there seems to be no more reason for the physical absence of an owner's representative universally to

In effect the arrangement between Corinth and the vessel was akin to special or private carriage as to which COGSA would not attach unless bills of lading are issued.[18] COGSA, 46 U.S.C. § 1305. Although bills of lading were issued they were not issued either by the vessel owner, Orient, or by one acting with its authority. Therefore, as we have held above Orient has no liability *in personam*.[19]

Nonetheless bills of lading were issued and the vessel sailed with the goods on board. Under those circum-

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insulate the vessel from accountability for personal injuries occasioned by unseaworthiness that there is to absolve the vessel from *in rem* liability for, say, other types of maritime torts including collision, even though the vessel, on this hypothesis, is wholly in the control of a demise charterer and, worse being conned by a compulsory pilot.

Grigsby, 412 F.2d at 1030-31, 1969 A.M.C. at 1539.

18. COGSA, 46 U.S.C. § 1305 provides:

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

19. As not issued under and pursuant to a charter party, 42 U.S.C. § 1301 has no immediate application:

COGSA, § 1301 provides in part:

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

stances, Black Letter Law translates Cleirac's historic aphorism "Le batel est obligé a la marchandise et la marchandise au batel"[20] into the settled maritime principle that sweeps away as immaterial any question of the authority of the issuer of the bills of lading to hold the ship liable *in rem* for loss or damage to the cargo carried.

[14-16] When cargo has been stowed on board the vessel and bills of lading are issued, the bills of lading become binding contracts of the vessel *in rem* upon the sailing of the vessel with the cargo. The sailing of the vessel constitutes a ratification of the bills of lading. *Compagnie De Navigation Fraissinet & Cyprien Fabre, S.A. v. Mondial United Corp.*, 316 F.2d 163, 173, 1963 A.M.C. 946, 956 (5th Cir. 1963); *see Cavcar Co. v. M/V SUZDAL*, 723 F.2d 1096, 1101, 1984 A.M.C. 609, 617 (3d Cir. 1983); *Demsey & Assoc. v. The S.S. SEA STAR*, 461 F.2d 1009, 1015, 1972 A.M.C. 1440, 1447 (2d Cir. 1972); *cf. Insurance Co. of North America v. The S/S AMERICAN ARGOSY*, 732 F.2d 299, 303, 1984 A.M.C. 1547, 1553 (2d Cir. 1984); *see also*, H. Longley, *Common Carriage of Cargo*, § 3.05[1][b] at 26 (1967). This action gives rise to a maritime lien which is the basis of the *in rem* recovery. Even though the vessel is operating under charter parties, the lien against the vessel is not affected. *Demsey*, 461 F.2d at 1014, 1972 A.M.C. at 1446. Therefore, the sailing of the MONTMARTRE with the cargo of steel pipes aboard constituted a ratification of the bills of lading.

Initially the trial court determined that although a vessel may be liable *in rem* as the carrier, the MONT-

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20. G. Gilmore & C. Black, *The Law of Admiralty*, § 3-45 at 187 (2d ed. 1975) (quoting *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 497, 43 S. Ct. 172, 173, 67 L.Ed. 364, 367, 1923 A.M.C. 55, 58 (1923).

MARTRE was not liable for the loss since that loss arose from the act or omission of the shipper, Corinth. In its amended conclusions of law, the trial court withdrew its prior conclusion regarding the MONTMARTRE's liability and determined that there was no *in rem* jurisdiction over the vessel. Because today we determined that the vessel was properly before the court, *in rem*, and there is *in rem* liability for loss or damage to the cargo, we remand to the trial court for the determination of liability against the vessel *in rem* for losses within the First suit (District Court No. H-80-1721).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The majority has concluded that the filing of a Claim of Owner alone subjects a vessel to the *in rem* jurisdiction of the court. In my view, *in rem* jurisdiction over the vessel existed only if the owner intended to waive its arrest or if a waiver of arrest was the necessary legal consequence of the filing of a Claim of Owner. The owner did not intend to concede *in rem* jurisdiction, and nothing in the applicable rules of procedure contemplates the found waiver of arrest. There is, then, no legal basis for the implication of *in rem* jurisdiction, and I dissent.

I

The record leaves no doubt but that the vessel owner did not intend to concede *in rem* jurisdiction. As pointed out by the majority, there were two suits consolidated before the same judge. Claims of Owner were filed in both suits. The claims of ownership were identical except

that in the second suit, the Claim of Owner stated ". . . without waiving its defense that it is not subject to the jurisdiction of this honorable court." The owner has always contested the absence of *in rem* jurisdiction. Yet, the majority concludes that the omission of the "without waiving its defense" qualifying language gave the court *in rem* jurisdiction in the first case. Even if an intent to waive arrest could be inferred from this plain inadvertance, it ought not be; certainly the district court was not required to do so. An admiralty court has the "power" to "withdraw from the extremes to which the general appearance rule ha[s] been pushed and to find no waiver when there [is] no *intentional* abandonment of the jurisdictional objection." *Giannakouros v. Oriental Tanker Corp.*, 338 F.2d 649, 650 (4th Cir. 1964), *cert. denied*, 380 U.S. 979, 85 S. Ct. 1343, 14 L.Ed.2d 272 (1965) (emphasis added). *See also Untersinger v. United States*, 172 F.2d 298, 301 (2d Cir. 1949) (no waiver where objection to venue in admiralty action made in answer that also pleaded to merits).

II

If waiver of arrest here cannot rest upon a conclusion that the owner intended to concede *in rem* jurisdiction, the majority's opinion then must rest upon a reading of the rules that the filing of a Claim of Owner necessarily subjects the vessel to *in rem* jurisdiction. I find nothing to support that reading.

It is true that the Supplemental Rules of Admiralty are only *supplemental*. Actions *in rem* are governed by the general Rules of Civil Procedure, "except to the extent that they are inconsistent with [the] Supplemental Rules." Fed. R. Civ. P. A, Supplemental Rules for Certain Ad-

miralty and Maritime Claims. But it does not follow, as the majority urges, that a Claim of Owner, as a responsive pleading, is analogous to a Rule 12 motion or an answer in which jurisdictional objection must be made or be held waived. The civil rules explicitly provide for waiver. The admiralty rule has no such requirement.

Admiralty Rule C sets the procedural scheme for bringing and responding to an *in rem* claim. After outlining notice and arrest procedures, the Rule addresses the *necessary* initial response to such action. Rule C(6) provides in part:

> (6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. *The claim* shall be verified on oath or solemn affirmation, and *shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action.* If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. . . . (emphasis added).

The Claim may be filed by any person asserting either an ownership or a possessory interest in a vessel subject to *in rem* arrest or service of process. 7A J. MOORE, *Moore's Federal Practice* ¶ C.16 at 700.13. "The filing of a claim is a *prerequisite* to the right to file an answer and defending on the merits." *Id.* at 700.14 (emphasis added). *See also United States v. Fourteen (14) Handguns,* 524 F.Supp. 395, 397 (S.D. Tex. 1981). The

Advisory Committee Notes, while not addressing this issue, state that the purpose of Rule C(6) was to provide a uniform rule "so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer," and to require "claimants to come forward and identify themselves at an early stage of the proceedings—*before they could fairly be required to answer.*" (emphasis added). *See also Bank of New Orleans & Trust Co. v. Marine Credit Corp.*, 583 F.2d 1063, 1068 n. 7 (8th Cir. 1978) (Rule C(6) "provides an appropriate method by which to assert . . . claim"). Apparently, then, the Claim simply confers the standing necessary to answer a libel against a vessel. *See United States v. $4,255,625.39*, 528 F.Supp. 969, 971 (S.D. Fla. 1981).

Rule C(6) requires all claimants to demand "restitution and the right to defend the action." A vessel owner, then, makes no substantive demand beyond that required by the Rules when he demands return of the vessel. Moreover, in the Claim held here to constitute an appearance, Orient made claim to the MONTMARTRE as its owner and asked only "to defend accordingly." Although the majority suggests otherwise, Orient did not specifically demand the vessel's return in its initial Claim.

A Claim of Owner lacks "many of the earmarks" of the inherently consensual letter of undertaking. Admiralty courts have traditionally waived strict adherence to the jurisdictional requirement of arrest, and allowed release of a vessel from custody upon the posting of a bond or a stipulation for value. Such a bond confers jurisdiction even in the absence of arrest. G. Gilmore & C. Black, *The Law of Admiralty*, § 9-89, at 796-801 (2d ed. 1975).

In effect, the ship's owner *consents* to the court's *in rem* jurisdiction to avoid the attendant delays and economic costs associated with attachment. *See United States v. Marunaka Maru No. 88,* 559 F.Supp. 1365, 1368-69 (D. Alaska 1983). As the majority points out, admiralty courts have also recently permitted private letters of undertaking between the owner and claimant to take the place of bond or stipulation. *See* G. Gilmore & C. Black, *supra,* at 800-01. In *Continental Grain Co. v. Federal Barge Lines, Inc.,* 268 F.2d 240, 243 n. 3, 1959 A.M.C. 2158 (5th Cir. 1959), *aff'd sub nom. Continental Grain Co. v. Barge FBL-585,* 364 U.S. 19, 80 S. Ct. 1470, 4 L.Ed.2d 1540 (1960), for example, the undertaking expressly stated that the parties' rights would be treated as if the vessel had, in fact, been arrested. The court thus treated the letter "as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree with sureties executed and filed by Claimant, and the vessel formally released." *Id.* at 243. The bond, stipulation for value, and letter of undertaking, then, become jurisdictional substitutes for the vessel itself, the *res* upon which the court may act. *See Continental Grain Company,* 364 U.S. at 38, 80 S. Ct. at 1481 (Whittaker, J., dissenting) ("This Court has from an early day consistently held that a bond, given to prevent the arrest or procure the release of the vessel, is substituted for and stands as the vessel in the custody of the court"); *J.K. Welding Co., Inc. v. Gotham Marine Corp.,* 47 F.2d 332, 335 (S.D. N.Y. 1931) ("The stipulation for value is a complete substitute for the res, and the stipulation for value *alone* is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the *res* in the court's custody. . . .")

(emphasis added). *See also Alyeska Pipeline Service Co. v. Vessel Bay Ridge,* 703 F.2d 381, 384 (9th Cir. 1983), *cert. denied,* ____U.S.____, 104 S. Ct. 3526, 82 L.Ed.2d 852 (1984); *American Bank of Wage Claims v. Registry of District Court of Guam,* 431 F.2d 1215, 1218 (9th Cir. 1970). The Claim of Owner then is an unlikely substitute for the arrested vessel, for it provides no affirmative "undertaking" from which an *in rem* judgment could be satisfied.

The majority relies upon *Reed v. YAKA,* 307 F.2d 203, 204, 1962 A.M.C. 1226, 1228 (3d Cir. 1962), *rev'd on other grounds,* 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448 (1963). There, the vessel was outside the court's territorial jurisdiction, was never arrested, and no bond or stipulation for value was ever filed. The owner answered on the merits, averring that "it voluntarily appeared as claimant to avoid attachment and delay of the vessel if it should subsequently be present" within the territory. *Id.* He failed to raise the lack of *in rem* jurisdiction until appeal. The court held the owner's "voluntary appearance" was equivalent to a letter of undertaking, waiving arrest and consenting to jurisdiction so far as "its interest in the ship." *Id.* at 205. Unlike Orient here, the owner in *Reed* made a general appearance, answered on the merits, and never raised a jurisdictional objection until after trial and on appeal. *The ROSALIE M,* 12 F.2d 970, 1927 A.M.C. 999 (5th Cir. 1926), dealt with waiver of irregularities in arrest "[*a*]*fter* a ship is brought into the custody of the marshal through proper admiralty process." *Id.* at 971 (emphasis added). *The MERINO,* 22 U.S. (9 Wheat.) 391, 401, 6 L.Ed. 118 (1824), dealt with irregularities in service of process,

which the Supreme Court held had "nothing to do with the question of jurisdiction." The Court expressly stated that the property at issue was within the territorial jurisdiction of the district court. *Id.*

I find no basis to quarrel with the district court's ruling. I must dissent, respectfully.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1721

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES,
TACKLE, ETC., ET AL.,
Defendants

ORIENT LEASING CO., LTD.,
Cross-Plaintiff

v.

CORINTH PIPEWORKS, S.A.,
Cross-Defendant

ORIENT LEASING CO., LTD.,
Third-Party Plaintiff

v.

CANADIAN FOREST NAVIGATION
COMPANY LIMITED, SEANAV
INTERNATIONAL COMPANY,
LTD. AND EMPIRE-UNITED
STEVEDORING CORPORATION,
Third-Party Defendants

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES, BOILERS, TACKLE, ETC., AND ORIENT LEASING COMPANY, LTD., HER OWNER AND OPERATOR,
Defendants

(Filed July 6, 1983)

MEMORANDUM OPINION

The Plaintiff, Cactus Pipe & Supply Co., Inc. ("Cactus") brings this suit in Admiralty to recover $28,673.51 for short delivery and damage done to a cargo of steel pipe. Cactus purchased 11,858 joints of steel pipe from Corinth Pipeworks, S.A. ("Corinth"), a Greek corporation. Corinth informed Cactus that the cargo would be transported aboard the M/V MONTMARTRE for delivery in Houston, Texas. The Defendants are the seller/shipper Corinth, the vessel *in rem*, and its owner, Orient Leasing Co., Ltd. ("Orient"). In the event that Orient is held liable, the shipowner seeks indemnity from Canadian Forest Navigation Company Limited ("Canadian Forest"), Seanav International Company, Ltd. ("Seanav"), which both sub-chartered the vessel, and Empire-United Stevedoring Corporation ("Empire") which unloaded the cargo in Houston. In addition, Orient has cross-claimed for indemnity against Corinth on the ground that Corinth voyage chartered the ship.

The cargo was loaded aboard the MONTMARTRE in Corinth, Greece July 3-14, 1979. Nine clean bills of

lading on the cargo were issued to Corinth on July 14, 1979 signed by Delpa Shipping & Transportation Co., Ltd. ("Delpa") for the master. The ship arrived in Houston on or about August 7, 1979. Surveyors observed damage in the hold before unloading. The pipe appeared nicked and gouged. Further loss was incurred upon unloading August 7-11, 1979. Upon final count, a shortage was found in the quantity delivered.

As a preliminary matter, the Court addresses certain evidentiary questions which arose at trial. The Court has reviewed the docket control letters and the Pre-Trial Order filed in this case and concludes that the exhibits listed in the Pre-Trial Order were subject to objection at trial.

Orient offered certain charter parties as Exhibits 2, 3, 4, and 5. Objection was made on the ground that these documents were not properly authenticated. That objection is hereby sustained in part and overruled in part. These exhibits are excluded generally but are admitted against those parties who previously conceded their authenticity. Thus the exhibits are admitted against Canadian Forest and Seanav. Exhibit 5 is also admitted against Corinth. Exhibit 21, offered by Orient as an enlargement of the text of the bills of lading, is excluded because it is an incomplete reproduction of those documents.

Some background is necessary to understand the parties' relationships. Orient conveyed the M/V MONTMARTRE to Eternity Navigation Co., S.A. by bareboat charter in September, 1976. Orient thereby surrendered all control over the operations and manning of the ship. (Orient Exhibit 1) In May, 1976 the vessel was time

chartered to Iino Kaiun Kaisha, Ltd. ("Iino") which in turn chartered the vessel to Canadian Forest on June 29. 1979 for forty-five to fifty days. (Orient Exhibits 2, 3) On July 3, 1979 Canadian Forest conveyed the M/V MONTMARTRE by voyage charter to Seanav. (Orient Exhibit 4) Lastly, Seanav chartered the vessel to Corinth for the voyage in question. (Orient Exhibit 5)

FINDINGS OF FACT

Cactus purchased the pipe from Corinth pursuant to a contract between them as evidenced by Corinth's invoices. (Cactus Exhibits 2a-i) Under this agreement, Corinth was to arrange for shipment. (Testimony of Roger Bartelsmeyer)

Loading in Greece was performed by stevedores of the Port of Corinth who were hired for the account of Corinth Pipeworks. These individuals worked each for his own account, although their employment through their union was legally compulsory. (Orient Exhibit 11)

The four holds of the ship were loaded according to the stowage plan drawn on Iino's form. (Empire Exhibit 3) This shipment destined for Houston filled three hatches.

The bills of lading specify that a quantity of steel pipe loaded in Corinth, Greece was shipped by Corinth Pipeworks per M/V MONTMARTRE to be delivered to order in Houston. (Cactus Exhibits 7a-i) No "carrier" as such was named in the documents. The instruments were signed by Delpa as agent for the Master. The Master, an employee of Iino, had granted Delpa authority to sign on his behalf in writing. (Corinth Ex-

hibit 1; Canadian Forest Exhibit 9) Delpa was also Corinth's agent for the purpose of notice. (Orient Exhibit 5) Technically, the bills of lading were not issued by Orient, Corinth, or their general agents, but rather by the agent of the time-charterer, Iino.

The cargo arrived damaged and short in Houston. Cactus suffered a resulting loss amounting to $28,673.51. The Plaintiff's insuror paid out $18,673.51 for the loss and is subrogated to the Plaintiff's claim to that extent under the insurance policy. (Cactus Exhibits 12, 13)

Upon delivery, eighty pieces of pipe were shortlanded. The value of such pipe was $22,101.82. (Cactus Exhibit 10) Due to improper handling and stowage in Greece, many pieces of pipe were bent, gouged, and distorted. A small degree of further damage was unavoidable at discharge because the pipes had been so tightly stowed. (Empire Exhibit 2) Cactus repaired the pipe at a reasonable cost of $6,571.69. (Cactus Exhibit 10)

CONCLUSIONS OF LAW

The Defendant, Corinth, has objected to this Court's exercise of personal jurisdiction over it. However, the Court concludes that Corinth was doing business in Texas within the meaning of Tex. Stat. Ann. art. 2031b § 4 by virtue of the sales contract with Cactus. Corinth has sufficient minimum contacts with the state of Texas, which contacts were nonfortuitous. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *Hanson v. Denckla,* 357 U.S. 858 (1958).

The Bills of Lading provide that all disputes thereunder are to be determined under English law. Normally, such

express choice of law would dictate the applicability of the foreign law. *Hellenic Lines, Ltd. v. Embassy of Pakistan,* 467 F.2d 1150 (2d Cir. 1972). However, the party relying on such foreign law has the burden of proof to establish precisely what that law is and how it is to be interpreted. *Application of Chase Manhattan Bank,* 191 F.Supp. 206, 209 (S.D. N.Y. 1961), *aff'd* 297 F.2d 611 (2d Cir. 1962). At the trial of this case the foreign law was not proved, thus the law of the forum will be applied. *Gray v. Martindale Lumber Company,* 515 F.2d 1218, 1220 (5th Cir. 1975), *reh'g denied* (1976), *citing Seguros Tepeyac S.A. Compania Mexicano v. Bostrum,* 347 F.2d 168 (5th Cir. 1965). Here, because the bills of lading evidence a contract for the carriage of goods by sea to a port of the United States, in foreign trade, the applicable law is the Carriage of Goods by Sea Act ("COGSA"); 46 U.S.C. §§ 1300-1315.[1]

Under COGSA, § 1303(2), the "carrier" is liable for proper loading, handling, and stowage of cargo. The issue is who was the "carrier" of this cargo of steel pipe.

Section 1301(a) provides that, "(t)he term 'carrier' *includes* the owner or the charterer who enters into a contract of carriage with a shipper." (emphasis added) Generally, the courts look to the bill of lading to determine who shall be held liable as the "carrier." *E.g., Associated Metals & Minerals Corporation v. S.S. PORTORIA,* 484 F.2d 460 (5th Cir. 1973). The bills of

1. Even if the English law had been proven, if it called for a decrease in the carrier's liability it would have been invalid because COGSA forbids any lessening of the carrier's liability in the bill of lading. *Indussa Corporation v. S.S. PANBORG,* 377 F.2d 200 (2d Cir. 1967) (*en banc*).

lading in this case, however, were not signed or issued by any of the parties to this suit or their agents.

Nonetheless, the statutory language is broad and the term need not be restricted to signatories of the bill of lading, *Trade Arbed, Inc. v. S/S ELLISPONTOS,* 482 F.Supp. 991, 994 (S.D. Tex. 1980). The wording of section 1301(a) is sufficiently inclusive to allow the courts to determine "carrier" status in light of the legislative purpose to alleviate the prior imbalance of bargaining power between cargo interests and the carrier, *Joo Seng Hong Kong, Co. Ltd., v. S.S. UNIBULKFIR,* 483 F.Supp. 43, 47 (S.D. N.Y. 1979). In fact, there may be more than one "carrier" liable for a given shipment of cargo. Where the shipowner or charterer has not signed the bill of lading, the court may impose "carrier" liability based upon other evidence of contract of carriage tying the party to the bill in question, *UNIBULKFIR,* at 46.

The shipowner, Orient, having demised the MONTMARTRE, had no control or authority over it. There is no evidence associating Orient with carriage of the Cactus cargo, hence it would be inappropriate to hold Orient liable as a "carrier." *Cf. Trans-Amazonica Iquitos, S.A. v. Georgia Steamship Co.,* 335 F.Supp. 935, 940 (S.D. Ga. 1971) (Where a ship is chartered but not demised and the master issued bills of lading, the owner may be liable.)

Corinth played a dual role in the transportation of the cargo. First, Corinth was the seller/shipper of the pipe under the sales contract and the bills of lading. Second, Corinth was the voyage charterer of the vessel. Thus Corinth is responsible to Cactus as the "carrier" for the sum of $28,673.51.

The vessel itself may be held liable *in rem* as the "carrier," *e.g., Compagnie De Navigation Fraissinet & Cyprien Fabre S.A. v. Mondial United Corp.,* 316 F.2d 163 (5th Cir. 1963). But a vessel is not liable for loss arising from the act or omission of the shipper, Corinth; thus the MONTMARTRE is not liable for the Plaintiff's loss.

The Court does not rule on the liability of Empire, Seanav, or Canadian Forest because the Plaintiff has not claimed against them directly, nor has Corinth sought indemnity from them.

Pre-judgment interest shall accrue from August 11, 1979 at the rate of nine percent per annum. Post judgment interest, if any, shall accrue at the rate of 9.59 percent per annum. To the extent the insuror has been subrogated to the Plaintiff's claim, it shall be entitled to the recovery provided herein.

The Court has on this date entered a Final Judgment in conformity with this Memorandum Opinion.

The Clerk shall send a copy of this Memorandum Opinion to counsel for the parties.

DONE in Houston, Texas, this 6th day of July, 1983.

/s/ JAMES DE ANDA
James DeAnda
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1721

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES,
TACKLE, ETC., ET AL.,
Defendants

ORIENT LEASING CO., LTD.,
Cross-Plaintiff

v.

CORINTH PIPEWORKS, S.A.,
Cross-Defendant

ORIENT LEASING CO., LTD.,
Third-Party Plaintiff

v.

CANADIAN FOREST NAVIGATION
COMPANY LIMITED, SEANAV
INTERNATIONAL COMPANY,
LTD. AND EMPIRE-UNITED
STEVEDORING CORPORATION,
Third-Party Defendants

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES, BOILERS, TACKLE, ETC., AND ORIENT LEASING COMPANY, LTD., HER OWNER AND OPERATOR,
Defendants

(Filed July 6, 1983)

JUDGMENT

In accordance with this Court's Memorandum Opinion of even date, the Court enters this Judgment in favor of the Plaintiff, Cactus Pipe & Supply Company, Inc.

The Plaintiff shall have and recover judgment against the Defendant, Corinth Pipeworks, S.A., in the sum of $28,673.51. Pre-judgment interest shall accrue at the rate of nine percent per annum from August 11, 1979. Post judgment interest shall accrue at the rate of 9.59 percent per annum from this date.

This is a Final Judgment.

The Clerk shall send a copy of this Final Judgment to counsel for the parties.

DONE in Houston, Texas, this 6th day of July, 1983.

/s/ JAMES DE ANDA
James DeAnda
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1721

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES, TACKLE, ETC., ET AL.,
Defendants

ORIENT LEASING CO., LTD.,
Cross-Plaintiff

v.

CORINTH PIPEWORKS, S.A.,
Cross-Defendant

ORIENT LEASING CO., LTD.,
Third-Party Plaintiff

v.

CANADIAN FOREST NAVIGATION COMPANY LIMITED, SEANAV INTERNATIONAL COMPANY, LTD. AND EMPIRE-UNITED STEVEDORING CORPORATION,
Third-Party Defendants

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES, BOILERS, TACKLE, ETC., AND ORIENT LEASING COMPANY, LTD., HER OWNER AND OPERATOR,
Defendants

(Filed August 11, 1983)

AMENDED CONCLUSIONS OF LAW

The Court has carefully considered the Plaintiff's Motion for Modification of Judgment and the responses filed by Defendants, Corinth Pipeworks S.A. ("Corinth") and Orient Leasing Co. Ltd. Having thoroughly reviewed the matter, this time with the benefit of the parties' briefs, the Court enters the following Amended Conclusions of Law.

As regards the M/V MONTMARTRE, the necessary process *in rem* never issued nor was the vessel arrested. No bond or letter of undertaking was filed by the shipowner. The Claim of Owner filed by Orient Leasing manifests the owner's interest in the vessel but does not establish the Court's *in rem* jurisdiction. *Associated Metals & Minerals Corporation v. S.S. PORTORIA*, 484 F.2d 460, 462 (5th Cir. 1973); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 9-89, at 800-01 (1975). Therefore, the Court has no jurisdiction over the M/V MONTMARTRE to decide the vessel's liability whatsoever. The prior conclusion regarding the vessel's liability is hereby withdrawn.

As to Corinth, there is case law to support a holding that a voyage charterer/shipper may be liable as a "carrier" to the consignee of cargo under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315; however, the Court concludes that in this case the evidence is insufficient to hold Corinth liable as the "carrier." Proof is lacking as to Corinth's involvement in the loading process in Greece and at other times during shipment of the cargo. Similarly, the evidence is silent in regard to the cause for short delivery of eighty pieces of pipe and when it occurred. Corinth had little or no responsibility for the operation of the vessel by virtue of its charter party. A. ZOCK, *Charter Parties in Relation to Cargo,* 45 TUL.L. REV. 733-51 at 735 (1971). Under the bills of lading, Corinth is given no particular control over the carriage of the cargo. Thus the Court withdraws its former conclusion as to Corinth's liability, and Plaintiff shall recover nothing.

The Court has on this date entered an Amended Final Judgment in conformity with these Amended Conclusions of Law.

DONE in Houston, Texas, this 11th day of August, 1983.

/s/ JAMES DE ANDA
James DeAnda
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1721

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES,
TACKLE, ETC., ET AL.,
Defendants

ORIENT LEASING CO., LTD.,
Cross-Plaintiff

v.

CORINTH PIPEWORKS, S.A.,
Cross-Defendant

ORIENT LEASING CO., LTD.,
Third-Party Plaintiff

v.

CANADIAN FOREST NAVIGATION
COMPANY LIMITED, SEANAV
INTERNATIONAL COMPANY,
LTD. AND EMPIRE-UNITED
STEVEDORING CORPORATION,
Third-Party Defendants

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff

v.

M/V MONTMARTRE, HER ENGINES,
BOILERS, TACKLE, ETC., AND
ORIENT LEASING COMPANY, LTD.,
HER OWNER AND OPERATOR,
Defendants

(Filed August 11, 1983)

AMENDED FINAL JUDGMENT

In accordance with the Court's Amended Conclusions of Law in this action, the Plaintiff Cactus Pipe & Supply Co. shall have and recover nothing. Amended Final Judgment is hereby entered for the Defendants, the M/V MONTMARTRE, Orient Leasing Co., Ltd., and Corinth Pipeworks, S.A.

This is a Final Judgment.

Done in Houston, Texas, this 11th day of August, 1983.

/s/ JAMES DE ANDA
James DeAnda
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1721

Consolidated With H-80-1769

CACTUS PIPE & SUPPLY CO., INC.

v.

M/V MONTMARTRE, Her Engines, Boilers, Tackle, Etc.; ET AL.

(Filed April 17, 1986)

MEMORANDUM AND ORDER

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is presently before the Court on remand from the Court of Appeals. Having reviewed the record and the applicable law, the Court amends its Findings of Fact and Conclusions of Law as set forth below.

In 1980, Plaintiff brought two lawsuits to recover for loss and damage to a cargo shipment of steel pipe; this action is a consolidation of the two lawsuits. The first action (H-80-1721) was brought in subrogation of Plaintiff's claim by its insurer, the second action (H-80-1769) was brought by Plaintiff for recovery of the uninsured portion of its loss.

The Court has previously found that the cargo was loaded aboard the vessel MONTMARTRE in Corinth, Greece in July, 1979, for ultimate delivery to Plaintiff in Houston, Texas. Nine clean bills of lading were issued on the cargo, however, no carrier was named in the documents. The vessel arrived in Houston in August, 1979, and surveyors observed damage to the cargo of steel pipe in the hold before unloading. The Court found that due to damage to the pipe and an actual shortage in the amount of pipe unloaded, Plaintiff suffered a loss amounting to $28,673.51. The Plaintiff's insurer paid out $18,673.51 for the loss and is subrogated to the Plaintiff's claim to that extent under the terms of the insurance policy.

The Court found the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, to be the controlling law in this case. The Court further found that under COGSA § 1303(a), the "carrier" is liable for proper loading, handling, and stowage of cargo. The issue presented in this action is who was the "carrier" of the cargo.

The Court originally found as a matter of law that Corinth in its capacity as seller and shipper of the steel pipe and as voyage charterer of the vessel was responsible as the "carrier" and liable to Plaintiff for the sum of $28,673.51.[1] The Court, however, in its amended con-

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1. Prior to the voyage charter of the MONTMARTRE by Corinth there had been a series of charters of the vessel. The MONTMARTRE, through its owner, Orient, was bareboat chartered to Eternity Navigation Co. in September of 1976 for a term of seven years. Eternity then time-chartered the vessel to Ino Kaium Kaisha, Ltd., who then time-chartered the MONTMARTRE to Canadian Forest Navigation Co., Ltd. in June of 1979. In July of 1979, Canadian Voyage chartered the MONTMARTRE to Seanav International Co. who in turn voyage chartered the vessel to Corinth.

clusions of law withdrew this finding on the grounds that there was insufficient evidence to attach "carrier" status to Corinth within the meaning of COGSA.

The Court originally found that as a matter of law a vessel may be held liable *in rem* as the "carrier" but held that the MONTMARTRE was not liable in this instance because of the act or omission of the Shipper Corinth. In its amended conclusions of law the Court found that it had no *in rem* jurisdiction over the vessel to determine its liability and thus vacated prior conclusions concerning liability of the vessel as "carrier." Additionally, in its amended conclusions of law the Court found the evidence insufficient to hold the Shipper Corinth liable as the "carrier" for damage to the cargo of steel pipe. The Plaintiff thus recovered nothing.

On appeal, the Court of Appeals held that the Court had *in rem* jurisdiction over the vessel in the first suit (H-80-1721) but not in the second suit (H-80-1769). The Court of Appeals then remanded the case for a determination as to the liability of the vessel *in rem* for damage and loss to Plaintiffs' cargo in the first suit.

The Court thus amends its conclusions of law to conform with the holding and mandate of the Court of Appeals. The Court has *in rem* jurisdiction over the vessel MONTMARTRE in the first action (H-80-1721). Jurisdiction attached when the vessel owner, Orient, appeared and filed a claim of owner wtihout challenging the Court's *in rem* jurisdiction. However, there is no *in rem* jurisdiction in the second action (H-80-1769) because Orient adequately raised and preserved its jurisdictional objection.

The Court thus reconsiders the liability of the vessel *in rem* for the cargo damage. In the absence of clear evidence showing a contractual relationship between owner and charterer of a kind which would absolve the vessel and her owners from all responsibility for cargo, the vessel is a "carrier" as that term is used in § 1301 of COGSA. *Compagnie DeNavigation, Etc. v. Mondial United Corp.*, 316 F.2d 163, 172 (5th Cir. 1963).[2] Orient never contractually limited the liability of the vessel for any loss or damage sustained by cargo. Thus, the Court amends its conclusions of law to find the MONTMARTRE to be the "carrier" of the cargo of steel pipe. As "carrier," the MONTMARTRE is liable to Plaintiff for proper and careful loading, handling, stowage, carry, keep, care for and discharge of the goods carried. 46 U.S.C. § 1303(2). With this status, the vessel MONTMARTRE also became subject to the liabilities and responsibilities imposed under 46 U.S.C. § 1304. *Compagnie DeNavigation*, 316 F.2d at 172. As a matter of law, MONTMARTRE never met the requisite burden of proof to absolve itself from liability as the "carrier" under § 1304 of COGSA.

Additionally the maritime common law imposes liability upon the MONTMARTRE. Apart from the Carriage of Goods by Sea Act, the carrier has a duty under the general maritime law when the cargo is not delivered as received, to affirmatively show that the damage arose from an unexpected peril. *The S.S. Asturias*, 40 F.Supp. 168, 173 (S.D.N.Y. 1941). When the MONTMARTRE

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2. In the bareboat charter contract executed between Orient, as owner of the MONTMARTRE, and Eternity, Orient expressly contracted to exempt the owners from any loss, damage or delay of whatsoever kind.

sailed it did so with both the cargo of steel pipe on board and nine clean bills of lading covering such cargo. Under these conditions, the cargo became bound to the ship and the ship to the cargo, for delivery in the same condition as received. Plaintiff's claim for cargo damage thus created a maritime lien against the vessel MONTMARTRE. Under the common law this lien provides the basis for *in rem* recovery. The Court has jurisdiction over the vessel *in rem* in the first action, liability attaches to the vessel as "carrier" under COGSA and due to the vessel's failure to meet its burden of proof under both general maritime law and § 1304 of COGSA, a general maritime lien attaches to the vessel for cargo damage. Orient, as owner of the MONTMARTRE, asserts that if the Court holds the vessel liable *in rem* for the cargo damage that they should be indemnified by the charterer of such vessel.

Orient's claim as a third-party plaintiff for indemnification by Seanav, the charterer, based on the avoidance of circuity of action is irrelevant to the disposition of the vessel's liability *in rem*. If the judicial peril of liability *in rem* is more than a vessel owner wants to bear, he can by contract between himself and the user (charterer) shift the risk to a secondary one. *American Tobacco Co. v. S.S. Katingo Hadjipatera,* 194 F.2d 449 (2nd Cir. 1951). It has already been established that Orient, as owner of the MONTMARTRE, never expressly contracted out of *in rem* liability against the vessel.

Accordingly, the Court finds that the vessel MONTMARTRE is liable *in rem* to Cactus in cause number H-80-1721, for the sum of $18,673.51. The awarding of prejudgment interest lies within the discretion of the

Court, however, the allowance of prejudgment interest in maritime cases is the rule, rather than the exception. *Richendollar v. Diamond M. Drilling Co., Inc. et al.*, No. 84-2492, slip op. at 3837 (5th Cir. March 5, 1986). In setting the rate of prejudgment interest admiralty courts have broad discretion and may look to state law or other reasonable guideposts indicating a fair level of compensation. *Todd Shipyards Corp. v. Auto Transportation, S.A.*, 763 F.2d 745 (5th Cir. 1985). Prejudgment interest shall accrue from August 11, 1979 at the rate of 6.31 percent *per annum* to this date. Post judgment interest shall accrue from this date at 6.31 percent *per annum*. To the extent the insuror has been subrogated to the Plaintiff's claim, it shall be entitled to the recovery provided herein. Plaintiff shall take nothing on its claims asserted in cause number H-80-1769.

DONE in Houston, Texas, this 17th day of April, 1986.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1721

Consolidated With H-80-1769

CACTUS PIPE & SUPPLY CO., INC.

v.

M/V MONTMARTRE, Her Engines,
Boilers, Tackle, Etc., ET AL.

(Filed April 17, 1986)

FINAL JUDGMENT

In accordance with the Memorandum and Order filed in the above-referenced cause on this date, judgment is hereby entered for PLAINTIFF Cactus Pipe & Supply Co., Inc. against Defendant M/V MONTMARTRE, *in rem*, in the amount of $18,673.51, together with prejudgment interest thereon at the rate of 6.13% *per annum* for the period of August 11, 1979 to the date of this judgment for a total of $26,273.43; and post-judgment interest thereon at the rate of 6.13% *per annum*.

All taxable costs are hereby assessed against the Defendant.

Let execution issue on all the above.

This is a Final Judgment.

DONE in Houston, Texas, this 17th day of April, 1986.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2356

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff-Appellee,

v.

M/V MONTMARTRE, Her Engines,
Boilers, Tackle, Etc., ET AL.,
Defendants,

ORIENT LEASING CO., LTD., and
M/V MONTMARTRE,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(D.C. No. CA-H-80-1721 c/w 80-1769)

(December 12, 1986)

Before WILLIAMS, JOLLY and DAVIS,
Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

This action to recover for loss and damage to cargo is before us for the second time. In the first appeal we held that the M/V MONTMARTRE, the vessel that transported the cargo, was subject to the in rem jurisdiction of the district court even though the vessel had never been served. We concluded that when Orient Leasing Co. (Orient) filed an unconditional claim as owner of the M/V MONTMARTRE, it subjected the vessel to the jurisdiction of the court. Cactus Pipe & Supply Co. v. M/V MONTMARTRE, 756 F.2d 1103 (5th Cir. 1985). We then remanded the case for a determination of damages and entry of judgment against the vessel.

On remand, the district court entered judgment against the M/V MONTMARTRE for $18,673.51, plus interest. The district court also rejected Orient's claim for indemnity against Seanav International Co. (Seanav).

In this appeal, Orient contends that the district court erred in denying its claims for indemnity against Seanav and Corinth Pipe Works (Corinth). Orient's arguments are meritless. Orient's indemnity claim against Seanav is predicated on an indemnity provision in Seanav's contract with Corinth. Any indemnity obligation Seanav owed under the contract was to Corinth; Orient, as a stranger to that contract, does not enjoy the benefit of that indemnity obligation. Orient did not seek indemnity from Corinth in the district court following remand and cannot complain that the district court did not grant this relief to it.

AFFIRMED.

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2356

CACTUS PIPE & SUPPLY CO., INC.,
Plaintiff-Appellee,

v.

M/V MONTMARTRE, Her Engines,
Boilers, Tackle, Etc., ET AL.,
Defendants,

ORIENT LEASING CO., LTD., and
M/V MONTMARTRE,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(January 13, 1987)

Before WILLIAMS, JOLLY and DAVIS,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States Circuit Judge